

Recession Relief: Employers Allowed Salary Flexibility

WORKPLACE: California labor commissioner approves temporary pay reduction for exempt workers

Here is some good news for California employers. The California Labor Commissioner has just published an Opinion Letter which provides employers with much needed relief during these difficult economic times. Here is what happened and how you can take advantage of the ruling.

With a slowdown in business, many companies are looking for ways to cut costs, while minimizing the negative effect on their employees and customers. To avoid laying off salaried exempt employees, employers may prefer to reduce their work hours with a commensurate reduction in salary. The affected employees also would likely view this more favorably than an outright layoff.

The California Labor Commissioner previously ruled that doing so would cause the employee to be deemed overtime eligible (and possibly entitled to back overtime wages). However, the Labor Commissioner's office has revisited the issue and has issued a much more employer-friendly opinion.

California employers have to follow both federal and state wage hour laws. On the federal side, the U.S. Department of Labor and several federal courts had concluded that this type of arrangement does not violate the federal wage law known as the Fair Labor Standards Act.

However, California took a different view entirely. The California Labor Commissioner's office – the State agency that enforces California's wage and hour law – ruled in 2002 that employers violate state law when reducing an exempt employee's salary to reflect a corresponding reduction in hours. The Labor Commissioner reasoned that since a "salary" is a flat sum to be paid regardless of how many (or few) hours are worked, the employer must pay the full salary even if the employee is asked

to work a reduced workweek. Otherwise, the employee is not really being paid a "salary" and must be paid overtime pay under the state's onerous overtime rules.

In an August 19, 2009 Opinion Letter, the Labor Commissioner acknowledged that its earlier enforcement position was based on an erroneous interpretation of the law. The Labor Commissioner concluded that California law permits employers to temporarily reduce an exempt employee's salary, with a commensurate reduction in hours, without jeopardizing the employee's overtime exempt status.

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The Labor Commissioner's new enforcement position is extremely helpful to employers looking for ways to avoid layoffs by reducing salaries and work hours. However, there are some important conditions that still must be satisfied to maintain the employee's exempt status.

First, the reduction in pay and hours must be temporary, and the employer must intend to restore the employee to a full salary and schedule when business conditions improve. The Opinion Letter was in response to an employer who was under significant economic pressure due to the recession. The employer in that case proposed that the salary and hours reduction would be temporary and that the employee would revert to a full schedule/pay as soon as economic conditions permitted. The author of the Opinion Letter went out of his way to emphasize this point - leaving open the possi-



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bility that salary and workweek adjustments that are not intended to be temporary may not receive the same treatment.

Second, all of the rules for maintaining overtime exempt status still must be satisfied. The employee still must spend more than half of the workweek performing exempt duties. The employee also must be paid a monthly salary of no less than twice the state's minimum wage, which presently equals \$2,773.33 per month. Further, the employee must be paid the entire new salary even if he or she works fewer hours than scheduled.

It is also important to keep in mind that the Labor Commissioner's Opinion Letter reflects the state agency's enforcement position. It is not binding on a court. No published California court decision has addressed this issue. Although the Labor Commissioner's Opinion Letter should be considered persuasive by a court, it is certainly possible that a judge could reach a different conclusion if an employee filed a lawsuit or challenged the reduced salary/hour arrangement. Companies should consult with their labor lawyer to understand the risks before implementing this arrangement.

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